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No. 89-1949

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

EDWARD TILGHMAN, ET AL.,
Petitioners,

v.

ERIC KOLKHORST,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF

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INTRODUCTION

The petition for certiorari herein presents the sole question:

> Whether, pursuant to the Veterans' Reemployment Rights Act, 38 U.S.C. Sections 2021-2026 (1982), a reservist has an absolute entitlement

> to a leave of absence from civilian employment regardless of the reasonableness of the leave request or the burden that such leave will impose upon the civilian employer?

On October 1, 1990, this Honorable Court entered an order inviting the Solicitor General to file a brief in this case expressing the views of the United States. The Solicitor General has not yet filed his brief herein, but did, on December 5, 1990, file a petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit in William "Sky" King v. St. Vincent's Hospital, No. 90-889 (reported below 901 F.2d 1068), presenting the following sole question, which is virtually identical to the question presented in this case:

> Whether an employee's right under 38 U.S.C. 2024(d) to a leave of absence from employment to serve in the Armed Forces of the United States is conditioned on the "reasonableness" of the employee's request for leave.

In light of the Solicitor General's petition for certiorari in Sky King, and further in light of the likelihood that his brief in this case will oppose the granting of certiorari herein, Petitioners file this supplemental brief.

ARGUMENT

The questions presented in the instant case and Sky King are substantially identical, both calling for the Court's determination of whether 38 U.S.C. 2024(d) includes a "reasonableness" standard. Petitioners and the Solicitor General agree the issue is of great importance, and that the Court should now resolve the division within the Courts of Appeals. Petitioners file this supplemental brief to demonstrate that any contention by the Solicitor General to the contrary notwithstanding, the instant case is more worthy of review than Sky King.[1]

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[1] Petitioners understand that the Court may conference to consider whether to grant the

As between the two cases, a decision by this Court in the instant case is likely to have greater future impact, and provide more guidance to the lower courts, than a decision in Sky King. Either case will serve equally well if the Court's ultimate conclusion is that a reservist's right to military leave is absolute under 38 U.S.C. 2024(d). On the other hand, if the Court should conclude that an employee's right to leave depends on the reasonableness of the request, then the instant case, which involves the more typical situation faced by

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instant petition before Respondent's brief in opposition in Sky King is due. In that eventuality, unless the Court is disposed to grant the petition herein, Petitioners respectfully suggest that the Court defer a decision which of the two cases, if either, to accept until after Respondent's brief in opposition in Sky King is considered, since such brief in opposition may demonstrate additional reasons why certiorari in the instant case is more efficacious than in Sky King.

public and private employers who must consider military leave requests, should be preferred over Sky King.

The seventeen day request for leave involved in the instant case is much more typical than the three year request involved in Sky King. A decision that a three year request for leave is subject to a "reasonableness" requirement need not necessarily resolve whether the more typical requests for leave of much shorter duration are subject to a "reasonableness" standard. In Monroe v. Standard Oil Company, 452 U.S. 549, 555-556 (1981) the Court stated that "38 U.S.C. Section 2024(d) was enacted in 1960 to deal with problems faced by employees who had military

training obligations lasting less than three months." [2] (emphasis added). This statement suggests that whether or not a leave request is subject to a "reasonableness" requirement may be contingent upon whether the leave exceeds three months. A decision by this Court in Sky King that requests for leave in excess of three months are subject to the rule of reasonableness would not require the Court to make any determination with regard to whether the more typical request for leave lasting less than three months is subject to such a rule. A decision in the instant case, on the other hand, would necessarily resolve whether requests for leave of less than three months are subject to the condition of reasonableness. Because the

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[2] The 1960 Senate Report on Section 2024(d) states the Section provides protection for trainees who are absent from employment for short periods, such as two hour drills, weekend drills, two week annual encampments, or special training or instruction periods lasting for 30, 60, or 90 days. S. Rep. No. 1672, 86 Cong., 2d Sess. at 2 (1960).

instant case requires a decision on the more typical problem confronted by employers dealing with military leave requests, a decision in the instant case will have greater impact than a decision in Sky King.[3]

Aside from the question of whether 38 U.S.C. 2024(d) is subject to "reasonableness" standard, which both cases present, the instant case provides a better backdrop for consideration of the contours and ramifications of such a standard, and a better basis for a ruling by this Court that will serve as settled precedent to guide the lower courts for many years in the future.

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[3] In his petition for certiorari in Sky King the Solicitor General acknowledges that "[t]o be sure, most Ready Reservists invoke the protections of Section 2024(d) for shorter periods of training - ordinarily one weekend of inactive duty training per month and 12 days of active duty training per year," and that extended leaves represent the "less common situation[]." Pet. for cert. in Sky King, No. 90-889, pp. 17, 18.

Sky King involves a request for a three year leave of absence, which the Eleventh Circuit held was per se unreasonable without any further inquiry concerning the conduct of the reservist or the particular impact upon the employer. Scant facts are present in Sky King to justify any extended discussion concerning the factors which have given the lower courts trouble in resolving, namely what kind of employee misconduct and what kind of impact on an employer would justify a denial of leave.

On the other hand, in the instant case Petitioner, a municipal police department, adopted a formal written policy on leave requests, based upon a reasonable managerial decision about what accommodations could be made to reservists consistent with its duty to protect the lives and property of the citizens of the City of Baltimore consistent with severe budgetary constraints and limited manpower resources. Unlike the record in Sky King, the

record in the instant case includes evidence produced by the employer concerning the rationale for its policy, and the substantial adverse impact upon its operations which non-adherence to the policy could produce. Thus, the instant case will provide the Court with a better vehicle than Sky King for considering impact on employers as a factor in deciding whether a reasonableness standard may properly be construed in the statute.

Similarly, the record in the instant case contains evidence of "conduct akin to bad faith," Gulf States Paper Corp. v. Ingram, 811 F.2d 1464, 1469 (11th Cir. 1987), in the reservist's erroneous indication on his employment application that he had no active duty reserve obligations, and in his accepting an assignment in a Selected Reserve Unit without obtaining prior approval from his employer, App., pet. for cert., 7a and 8a. Apart from the mere act of requesting a three year leave, the

conduct of the reservist in Sky King was never at issue. Therefore, the instant case presents a more complete record on the notion that employee misconduct can justify an employer in rejecting a leave request.

Finally, the difference between the employers involved in the case herein and Sky King suggests another weighty reason why a decision herein will have greater impact. Public employers across the nation, such as Petitioner herein, that have a substantial number of reservists employed in public safety agencies such as police departments, fire departments, rescue squads, agency security operations, and civil defense units, are especially in need of guidance from the Court concerning what limitations they may impose on the leave rights of reservists. Public safety agencies may be especially vulnerable when large numbers of reservists request leave at the same time. It is understandable, therefore, that agencies such

as Petitioner would adopt policies to address such problems. A decision in Sky King, however, unlike a decision in the instant case, may leave unresolved issues concerning the separate circumstances which justify a public employer in denying requests for leave.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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